89-2014

Supreme Court, U.S.
FILED
JUN 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ORTHOPEDIC EQUIPMENT COMPANY, INC.
Petitioner,
vs.
HAROLD WALTER PIETZ,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

HORACE C. IRELAND, III
Counsel of Record
PORTERFIELD, HARPER & MILLS, P.A.
#2 Office Park Circle, Suite 1
P. O. Box 530790
Birmingham, AL 35253-0790
(205) 879-5000

Attorney for Petitioner
ORTHOPEDIC EQUIPMENT COMPANY, INC.

QUESTIONS PRESENTED FOR REVIEW

This Petition for Writ of Certiorari presents the following questions to this Court for review:

1. Whether the Supreme Court of Alabama is in direct conflict with this Court by requiring federal statutes to be implemented which directly preempt state tort law prior to recognition of the Government Contractors' Defense.

2. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the application of the Government Contractors' Defense is always a jury question and as such the defense can never be used by the government contractor to support a summary judgment.

3. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the first condition of the Government Contractors' Defense requires that the government contractor produce evidence that the government had in fact considered and rejected the design which the plaintiff alleges should have been incorporated into the product.

4. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the second condition of the Government Contractors' Defense allows the plaintiff to overcome the contractor's proof that the product conformed to the government specifications by producing evidence which is totally irrelevant to the alleged design defect and which is based only upon conjecture and speculation.

5. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the third condition of the Government Contractors' Defense requires that the government contractor warn the United States of any design defects which may have existed at the time that the product was manufactured, even if the government contractor was totally unaware of any such design defects.

LIST OF PARTIES AND RULE 29. 1 STATEMENT

The following list includes all the parties to the proceeding from which petitioner seeks this Court's review:

1. Harold Walter Pietz
2. Orthopedic Equipment Company, Inc.
3. Biomet, Inc. (Biomet, Inc. is a party alleged to be the successor in interest to Orthopedic Equipment Company, Inc.)

Pursuant to Rule 29.1 of the Rules of this Court, petitioner, Orthopedic Equipment Company, Inc. states that the parent company of the petitioner is OEC Indiana, Inc., whose parent company is Biomet, Inc.; the only subsidiary of the petitioner (excluding wholly owned subsidiaries) is OEC Canada (Orthopedic) Ltd.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties and Rule 29.1 Statement ii

Table of Contents iii

List of Appendices v

Table of Authorities vi

Opinions Below 1

Jurisdiction of This Court 1

Statement of the Case:
A. The Trial Court Proceedings 3
B. Appellate Proceedings 4
C. Statement of Facts 5

Reasons for Granting This Petition 9

Discussion:
I. Whether the Supreme Court of Alabama is in direct conflict with this Court by requiring federal statutes to be implemented which directly preempt state tort law prior to recognition of the Government Contractors' Defense 9

II. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the application of the Government Contractors'

Page

Defense is always a jury question and as such the defense can never be used by the government contractor to support a summary judgment 13

III. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the first condition of the Government Contractors' Defense requires that the government contractor produce evidence that the government had in fact considered and rejected the design which the plaintiff alleges should have been incorporated into the product 15

IV. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the second condition of the Government Contractors' Defense allows the plaintiff to overcome the contractor's proof that the product conformed to the government specification by producing evidence which is totally irrelevant to the alleged defect and which is based only upon conjecture and speculation 18

V. Whether the Supreme Court of Alabama is in direct conflict with this Court by holding that the third condition of the Government Contractors' Defense requires that the government contractor warn the United States of any design defects which may have existed at the time that the product was manufactured, even if the government contractor was totally unaware of any such design defects 22

Conclusion.....25

LIST OF APPENDICES

Appendix A
Opinion, Jefferson County Circuit Court
Dated March 30, 1989 ..... A1

Appendix B
Opinion, Supreme Court of Alabama,
Released December 22, 1989 ..... B1

Appendix C
Order Denying Rehearing by the Supreme Court
of Alabama Dated March 23, 1990 ..... C1

Appendix D
Order Granting Stay, Jefferson County
Circuit Court, Dated June 18, 1990 ..... D1

TABLE OF AUTHORITIES

Cases **Page**

Boyle v. United Technologies
487 U. S. ___, 108 S. Ct. 2510 (1988) . .2, 12, 14, 17
Gainer v. Santoro
865 F. 2d 629 (5th Cir. 1989) 14
Hardovel v. General Dynamics
898 F. 2d 1311 (11th Cir. 1989) 14
In Re Joint Eastern & Southern District New York Asbestos Litigation
897 F. 2d 626 (2nd Cir. 1990) 14
Kennewick v. United States
880 F. 2d 1018 (9th Cir. 1989) 14
Kleemsan v. McDonnell Douglas
890 F. 2d 698 (4th Cir. 1990) 14
Nielson v. George Diamond
892 F. 2d 1450 (9th Cir. 1990) 14
Pietz v. Orthopedic Equipment Company, Inc.
88-908 (Ala. 1989), ...11, 16, 24
Smith v. Xerox
866 F. 2d 135 (5th Cir. 1989) 14, 21
Trevino v. General Dynamics Corp.
865 F. 2d 1474 (5th Cir. 1989) *reh'g denied* 876 F.2d 1154 (5th Cir. 1989), *cert denied,* 110 S. Ct. 327 (1989) 14

Statutes

28 U.S.C. Section 1257 (A) 1

PETITION FOR WRIT OF CERTIORARI

Orthopedic Equipment Company ("OEC") respectfully petitions this Court for a writ of certiorari to review the decision of the Supreme Court of Alabama as entered by that court in *Pietz v. Orthopedic Equipment Company, Inc.*, 88-908 (Ala 1989). [App., infra,B1]

OPINIONS BELOW

The opinion of the Jefferson County Circuit Court (trial court) is unreported. [App. infra, A-1]

The opinion of the Supreme Court of Alabama [App., Infra, B-1] is reported as *Harold Walter Pietz v. Orthopedic Equipment Company, Inc., et al.*, No. 88-908 (ALA 1989).

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Section 1257(A).

The decision of the Supreme Court of Alabama from which this petitioner seeks review was entered on December 22, 1989. [App., infra, B-1]. A timely application for rehearing was denied by the Supreme Court of Alabama on March 23, 1990. [App., infra, C-1].

Although the decision of the Supreme Court of Alabama from which this petitioner seeks review remanded the case to the trial court for further proceedings, the decision is final with respect to that court's interpretation of the federal issue in question, the Government Contractors' Defense. The additional trial court proceedings do not involve any further decision of federal questions that might require review by this Court. The only action of the trial court remaining to be done is to apply the facts of the

case to the interpretation of the Government Contractors' Defense as rendered by the Supreme Court of Alabama.

Postponing a review of this matter could seriously erode the federal policy known as the Government Contractors' Defense established by this Court in *Boyle v. United Technologies*, 487 U. S. ___, 108 S. Ct. 2510 (1988). If there is no review at this time, the petitioner may prevail on the merits on non-federal grounds and consequently leave standing and unreviewable a decision of the Supreme Court of Alabama which is in conflict with previous rulings of this court. The reversal of the Supreme Court of Alabama on their interpretation of the Government Contractors' Defense at this time would be preclusive of the issues at the trial level and at the same time provide a review of the General Contractors' Defense as interpreted by the Supreme Court of Alabama.

STATEMENT OF THE CASE

The petitioner, Orthopedic Equipment Company, Inc. ("OEC"), is a corporation existing and operating under laws of the State of Indiana.

Respondent, Harold Walter Pietz ("Pietz") is an individual residing at the time of the incident in the State of Alabama.

A. THE TRIAL COURT PROCEEDINGS

On October 23, 1987, Pietz filed his Complaint in the Circuit Court of Jefferson County, Alabama against OEC and several fictitious defendants. The complaint alleged that on or about November 16, 1985, the plaintiff was on mountain maneuvers with the ROTC in Steele, Alabama. As part of the ROTC Program, Pietz was rappelling down a cliff using, among other things, a carabiner ring manufactured by OEC. While the plaintiff was rappelling down the cliff, the carabiner ring was caused to come open allowing him to fall and suffer severe injuries. (R-1-6).

Pietz alleged that OEC negligently designed the carabiner ring he was using, in that OEC failed to incorporate into the design a screw down locking mechanism for the gate of the carabiner ring.

On November 19, 1987, OEC filed an answer to Pietz's complaint denying liability for his injuries. On April 29, 1988, OEC amended its answer specifically alleging that OEC was not liable to Pietz because OEC had complied with elements of the Government Contractors' Defense. (R-110)

On August 10, 1988, OEC filed a motion for summary judgment contending that OEC was not liable for any alleged design defects in the carabiner because of the pro-

tection provided by the Government Contractors' Defense outlined in *Boyle v. United Technologies,* 487 U. S. ___, 108 S. Ct. 2510 (1988). A memorandum brief was filed with the court in support of OEC's motion. A supplemental brief was also filed with the court detailing the Government Contractors' Defense on March 13, 1989. (R-116, 118-135, 356-365) The motion by OEC was supported by the deposition testimony of Pietz and several employees of OEC at the time of the manufacturing, John Wagoner, Inez Feldman, Lowell Gard, as well as the exhibits attached to the depositions. Pietz filed responses to the briefs relying on the same four depositions and exhibits. (R-143-162, 373-456).

The motion for summary judgment by OEC was set to be heard before the trial judge on March 24, 1989. After oral argument concerning the Government Contractors' Defense, the Honorable Wayne Thorn entered summary judgment in favor of OEC on March 30, 1989. [App. infra, C-1].

B. APPELLATE PROCEEDINGS

On April 11, 1989, Pietz filed a timely Notice of Appeal to the Supreme Court of Alabama. The issues on appeal as they relate to the complaint against OEC dealt exclusively with the application of the facts to the Government Contractors' Defense. Both Pietz and OEC submitted briefs to the Supreme Court of Alabama outlining their respective positions.

On December 22, 1989, the Supreme Court of Alabama filed its decision in which six (6) justices voted to reverse the trial court's ruling and two (2) justices voted to affirm. [App., infra, B-1]. It is that decision of the Supreme Court of Alabama from which OEC is seeking this Court's

review.

On January 12, 1990, OEC filed a timely application for rehearing which was denied by order of the Supreme Court of Alabama on March 23, 1990. [App., infra, C-1].

On June 18, 1990, the trial court entered a stay of the trial proceedings against OEC and Bionet, Inc. pending review of the petition for writ of certiorari by this court. [App., infra, D-1].

C. STATEMENT OF THE FACTS

The plaintiff in this case is Harold Walter Pietz ("Pietz"). At the time of the incident, Pietz was enrolled at Jacksonville State University majoring in political science with a minor in military science. *(Deposition of Pietz,* at 6). At Jacksonville State, Pietz was also enrolled in the ROTC program. *(Deposition of Pietz,* at 22-23). At the time of his injury, Pietz was rappelling down a cliff using the carabiner rings that had been issued to him by Sergeant Major Jack Wesson of the ROTC unit. *(Deposition of Pietz,* at 43-47).

The carabiner rings are pieces of equipment used to link together portions of the rope while rappelling down the mountain. They are also used to quickly link together other types of items, such as ropes with packages or cargo.

To rappel down the cliff, Pietz assembled a web seat and hooked the seat together at the front with a carabiner ring. *(Deposition of Pietz,* at 57, Exhibit 3). A rope that was anchored at the top of the cliff with two strands falling down to the base of the cliff was then looped through either a carabiner ring or a "figure eight" device. A second carabiner or "figure eight" device was then attached to the first carabiner ring. The friction of the rope with the second carabiner or "figure eight" device slows the descent. *(Dep-*

osition of Pietz, at 63, 65, Exhibit 5). The end of the loop was passed around the body to the back where the right hand of the individual exerts the required tension on the rope to allow descent in a controlled fashion. *(Deposition of Pietz,* at 66). As Pietz began his descent, he noticed that "the carabiner had inverted and one of the ropes [part of the loop] was free and the other rope was stuck in the gate." *(Deposition of Pietz,* at 70). When he tried to grab the rope, the rope snapped out of the carabiner and he fell to the ground. *(Deposition of Pietz,* at 98, 102).

At the scene where Pietz was injured there were three different devices he could have used to secure his ropes. There were two types of carabiner rings. One carabiner ring had a screwdown locking mechanism at the gate opening and the other carabiner ring had an internal locking mechanism located at the gate opening (such as the one manufactured by OEC). The third device available was a "figure eight" device, which is a solid ring with no gate opening. Pietz chose to use the carabiner rings which had the internal locking mechanism for his descent down the cliff.

Pietz was aware of the carabiners with screw-down locking mechanisms and the "figure eight" device, but did not request these on the day of his injury because he "didn't see any need for it." *(Deposition of Pietz,* at 51). The other students had been using these devices and since they were at the bottom of the mountain, he "used what was available at the top of the cliff." *(Deposition of Pietz,* at 52).

All the other members of the ROTC class, except one girl, had completed their descent to the bottom of the mountain when Pietz began his descent. He made his initial move from the top of the mountain over the edge or lip and came to a stop. The area he was rappelling had a rock face that was straight down from the top lip to the bottom. After coming to a stop over the lip, he shifted his seat,

looked over his shoulder and prepared to make his final bound. *(Deposition of Pietz,* at 69-70). It was at this time that he noticed the inverted carabiner and the loose rope strand.

Pietz contends that the carabiner ring which came open and caused him to fall was manufactured by OEC and caused his injury because it was negligently designed. (R-67). The specific carabiner ring involved cannot be identified.

OEC did manufacture carabiners for the United States Government. The carabiners were made pursuant to a contract entered into between OEC and the Defense Personnel Support Center, Defense Supply Agency of the United States Government. *(First Deposition of Wagoner,* at 16, 19-21, Exhibit 2) (R-242, 263-266).

The United States Government provided OEC with a detailed drawing of the carabiner ring describing the exact dimension of all the component parts. *(First Deposition of Wagoner,* Exhibit 3) (R-266). The Government also provided OEC with a ten-page document entitled "Military Specifications." *(First Deposition of Wagoner,* Exhibit 4) (R-267-277). This document described in detail all the features, standards, materials and other requirements necessary for the manufacture of the carabiner rings pursuant to the contract. The Government did not give OEC or allow OEC to assume any responsibility for the design of the carabiner.

The carabiner ring design supplied by the United States to OEC had an internal locking device for the carabiner gate. The gate is designed in such a way that when tension is placed on the carabiner, the gate automatically locks into place. *(Deposition of Gard,* at 70-71). Pietz contends that the carabiner was unsafe in that the carabiner should have had a screw-down type locking device incorporated into its

design.

The only change in the manufacturing of the carabiners from the original specification came early in the process, when OEC requested from the Government a change order to allow OEC to use a different type of steel alloy which would make the tooling of the carabiner an easier process. The Government agreed to such a change by means of a change order to the original contract. With the exception of this change in alloy, the carabiner rings were manufactured exactly according to the original specifications and drawings provided by the United States Government, Department of Defense to OEC.

On all carabiner rings accepted, the authorized government representative signed a form directly under language that stated:

> Acceptance of listed items has been made by me or under my supervision and they conform to the contract except as noted herein or on supporting documents.

(First Deposition of Wagoner, Exhibit 11). No exceptions were noted by the United States.

Although OEC did manufacture carabiners for the United States Government in this instance, OEC's employees and officers readily acknowledge that they had never made any equipment similar to a carabiner ring prior to this contract. This was the first job ever taken by OEC which involved any military equipment remotely similar to a carabiner ring. The employees of OEC admit they were never sure what the carabiners were used for except for mountain climbing in general. No employees of OEC had any experience in the use or design of carabiner rings.

REASONS FOR GRANTING THIS PETITION

The Government Contractors' Defense as outlined by this Court clearly states that state law "must be displaced" if a "uniquely federal" interest creates a "significant conflict" with federal policy. *See Boyle.*

In direct conflict with the ruling of this Court, the Supreme Court of Alabama ruled that the Government Contractors' Defense could not be used to support a summary judgment in the context of this suit absent federal legislation preempting state law. The Supreme Court of Alabama also ruled that even where the facts are undisputed, it is a question for the jury to decide as to whether the facts "establish the condition for the defense." Under Alabama law, as it presently stands, the Government Contractors' Defense cannot be used as grounds for summary judgment.

In further conflict with this Court, the Supreme Court of Alabama has interpreted the three conditions of *Boyle* to such an extent as to preclude a government contractor from prevailing upon the Government Contractors' Defense in almost all situations. The interpretation by the Supreme Court of Alabama places unfair and unduly burdensome requirements on the government contractor, none of which were contemplated by this Court.

The Government Contractors' Defense, as outlined in *Boyle,* recognized the special need for the federal law to preempt state law and to protect government contractors from state law design defect claims when the government contractor has manufactured military equipment and complied with the three conditions outlined therein. This Court recognized that the failure to have such a federal common law policy would in effect deter manufacturers from taking government contract jobs and encourage

manufacturers who did take the government contract jobs to increase their prices and pass that increase on to the government.

Unless this Court addresses the rulings of the Supreme Court of Alabama in this matter, this Court's decision in *Boyle* carries no weight or credibility to the manufacturers of government products who through direct contact or long arm statutes are subject to design defect lawsuits controlled by Alabama law.

The case as presented to this Court is a case based purely on a design defect allegation. There are no manufacturing defects alleged to cloud the issues or facts. The facts are not complicated and give this Court has an excellent opportunity to review the decision of the Supreme Court of Alabama and to reinstate the intended purpose of Government Contractors' Defense.

The effect of this Court's failure to address the decision of the Supreme Court of Alabama is to deprive all government contractors of their right to the Government Contractors' Defense for any product that subjects them to Alabama law. In particular, failure of this Court to address the Supreme Court of Alabama's decision deprives OEC of the summary judgment to which it is entitled under the facts of this case and pursuant to the Government Contractors' Defense as intended by this Court.

I. WHETHER THE SUPREME COURT OF ALABAMA IS IN DIRECT CONFLICT WITH THIS COURT BY REQUIRING FEDERAL STATUTES TO BE IMPLEMENTED WHICH DIRECTLY PREEMPT STATE TORT LAW PRIOR TO RECOGNITION OF THE GOVERNMENT CONTRACTORS' DEFENSE.

The Supreme Court of Alabama, in apparent disregard for this Court's ruling in *Boyle,* refused to recognize the Government Contractors' Defense as a ground for summary judgment by the government contractor because there was no federal statute implemented requiring preemption of state law.

The Supreme Court of Alabama resisted the application of the Government Contractors' Defense by citing the propositions from *Boyle* that the Government Contractors' Defense does not generally preempt state law. The Court then concluded that there must be a federal statute before preemption of Alabama's law on design defects can take place.

In their decision, the Supreme Court of Alabama in *Pietz* stated:

> There is no federal statute authorizing preemption of state law in cases of this kind. In fact, the Congress of the United States has for fifty years resisted the lobbying efforts by defense contractors to pass such statutes.

Pietz, supra [App., infra, B6].

The exact issue of whether or not federal legislation must be enacted was presented to this Court in *Boyle.* The injured party claimed that the Government Contractors' Defense should only preempt state design defect law if there is an explicit mandate outlined in federal legislation. In *Boyle,* this Court rejected such an argument by stating:

> Petitioner's broadest contention is that, in the absence of legislation specifically immunizing government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree.

Boyle, supra.

The case before this Court involves a government contractor (OEC) who produced carabiner rings under a military contract with the Defense Personnel Support Center, Defense Supply Agency. The allegation against the contractor (OEC) is a claim under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD). AEMLD is the common name for Alabama's form of strict liability which imposes tort liability upon a manufacturer of a product that is introduced into commerce which incorporates or is manufactured with a defective design, if an injury results from the defective design.

This court in *Boyle* clearly stated that the government contractor engaged in manufacturing a military product, such as the carabiner ring manufactured by OEC, should not be held liable under state law if the contractor met the three conditions outlined therein and if there is a significant conflict between state law and federal policy. This Court stated: "In sum, we are of the view that state law which holds government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Boyle, supra.*

Under the facts of the case before this Court there is clearly a "significant conflict" between the Alabama law and the federal policy outlined in *Boyle.* Under AEMLD, the defendant, OEC, can be held liable for damages that occurred as a result of the use of the carabiner rings if it can be shown that there was a defective design incorporated into the carabiner rings. Under the Government Contractors' Defense, OEC should not be held liable for such an injury because OEC complied with the three conditions outlined in *Boyle.* The primary purpose for *Boyle* and its displacement of state law is the recognition that a govern-

ment contractor should not be held liable under state law when the contractor cannot comply with both its contractual obligations to the Government and its duty of care suggested and prescribed by state law. Pietz alleges that OEC, in order to comply with state law, is required to place a screw down mechanism on the carabiner ring. In order to comply with its contractual obligations, OEC had to manufacture the product with the internal locking mechanism as specified and requested by the government. OEC could not comply with both requirements, and as a result of this "significant conflict", state law must be preempted.

Allowing the decision of the Supreme Court of Alabama to go unreviewed will deprive all government contractors, subject to Alabama law, of substantial federal rights under the Government Contractors' Defense.

II. WHETHER THE SUPREME COURT OF ALABAMA IS IN DIRECT CONFLICT WITH THIS COURT BY HOLDING THAT THE APPLICATION OF THE GOVERNMENT CONTRACTORS' DEFENSE IS ALWAYS A JURY QUESTION AND AS SUCH THE DEFENSE CAN NEVER BE USED BY THE GOVERNMENT CONTRACTOR TO SUPPORT A SUMMARY JUDGMENT.

The Supreme Court of Alabama has interpreted the decision of *Boyle* to stand for the proposition that the Government Contractors' Defense is always a question for the jury and therefore cannot be used to support a summary judgment on behalf of the government contractor. This ruling by the Supreme Court of Alabama is in direct conflict with this Court's ruling in *Boyle*.

The Supreme Court of Alabama in *Pietz* stated: "The Supreme Court makes it clear in *Boyle* that whether the

facts of the case establish the condition for the defense is a question for the jury." The court further stated: "Thus, it is clear that the question of whether a government contractor is to be shielded from liability becomes a question for the jury to weigh." *Id.*

In *Boyle,* this Court established that the government contractor can rely on the Government Contractors' Defense to support a summary judgment if there is no genuine issue as to the material facts. In such a situation, if the government contractor has met the three conditions of *Boyle,* the government contractor can be awarded a summary judgment as a matter of law. In *Boyle,* this Court stated:

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent [government contractor] at once, without a new trial.

Since *Boyle,* there have been numerous decisions by various courts which have upheld *Boyle* as a proper basis for summary judgment. *See In re Joint Eastern & Southern District New York Asbestos Litigation,* 897 F.2d 626 (2nd Cir. 1990); *Kleemsan v. McDonnell Douglas,* 890 F.2d 698 (4th Cir. 1989); *Gainer v. Santoro,* 865 F.2d 629 (5th Cir. 1989); *Hardovel v. General Dynamics,* 898 F.2d 1311 (11th Cir. 1989); *Smith v. Xerox,* 866 F.2d 135 (5th Cir. 1989). *See also, Nielsen v. George Diamond,* 892 F.2d 1450 (9th Cir. 1990); *Kennewick v. United States,* 880 F.2d 1018 (9th Cir. 1989); *Trevino v. General Dynamics Corp.,* 865 F.2d 1474 (5th Cir. 1989) *reh'g denied,* 876 F.2d 1154 (5th Cir. 1989) *cert. denied,* 110 S. Ct. 327 (1989).

The effect of the ruling by the Supreme Court of Ala-

bama in this case is to deprive all government contractors of the Government Contractors' Defense as outlined in *Boyle*. In essence, any government contractor who is subject to a design defect suit which is based on Alabama law is now subjected to a jury trial regardless of the facts. The Supreme Court of Alabama has refused to recognize that *Boyle* is the standard which must be applied in granting the government contractor a summary judgment when the contractor has complied with the three conditions outlined therein.

In the case before this Court, OEC has clearly met the three conditions required of a government contractor and OEC should be entitled to a summary judgment as a matter of law.

III. WHETHER THE SUPREME COURT OF ALABAMA IS IN DIRECT CONFLICT WITH THIS COURT BY HOLDING THAT THE FIRST CONDITION OF THE GOVERNMENT CONTRACTORS' DEFENSE REQUIRES THAT THE GOVERNMENT CONTRACTOR PRODUCE EVIDENCE THAT THE GOVERNMENT HAD IN FACT CONSIDERED AND REJECTED THE DESIGN WHICH THE PLAINTIFF ALLEGES SHOULD HAVE BEEN INCORPORATED INTO THE PRODUCT.

The Supreme Court of Alabama has opined that in order to meet the first condition of *Boyle,* the government contractor must show that the United States not only "approved reasonably precise specifications," but also that the United States considered and rejected the design which allegedly should have been incorporated into the product. Such a holding is not only in conflict with this

Court's ruling in *Boyle,* but is in conflict with the entire spirit upon which the Government Contractors' Defense was formulated. This argument outlined by the Supreme Court of Alabama was specifically rejected by this Court in *Boyle.*

The first condition as established by this Court in *Boyle* is simply that: "The United States approved reasonably precise specifications." *Id.* The Supreme Court of Alabama expanded that requirement in *Pietz* by not only requiring the government contractor to prove that the United States approved reasonably precise specifications, but by also requiring the contractor to show that the United States considered the screw-down locking mechanism as a safety device on the carabiner rings and then to show that the United States specifically rejected that design. The Supreme Court of Alabama stated:

> The first numerated test in Boyle requires that the Court examine whether the United States approved reasonably precise specifications. The record is devoid of any evidence that the government at any time considered and rejected the idea of a locking device on the gatekeeper feature of the snap link. In fact, it was the deposition testimony of Lowell Gard, a supervisor at OEC, who had general responsibility for the in-plant operations during the manufacture of the snap links, that the workers at OEC did not have any discussion with the government people about a safety locking nut or the lack of a locking nut on the snap link.

Pietz, supra [App., infra B4].

The purpose of the first condition in *Boyle* is for the government contractor to establish that the design feature

incorporated into the product was a design feature chosen by the government and not by the government contractor. OEC has clearly established that all the designs, drawings, specifications and dimensions for the carabiner rings, including any safety features incorporated therein, were provided by the United States. OEC does not have an engineering or design department and did not in any way participate in the design of the carabiner rings.

The Supreme Court of Alabama has violated the entire purpose of the first condition of *Boyle* by placing an additional burden on the government contractor never contemplated by this Court. The Supreme Court of Alabama has required OEC to show that the United States specifically considered and rejected the screw-down locking mechanism in its decisions on the design of the carabiner rings. This burden would require the contractor to show why the government chose to reject the screwdown locking mechanism and to accept the internal locking mechanism which was ultimately incorporated by the government into the carabiner design.

The central purpose of the Government Contractors' Defense is to allow the United States to make the decisions as to the type of design it wants on military products and in return to shield the government contractor from any allegations that the design chosen by the United States is not proper. In *Boyle,* this Court made that purpose clear by stating:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis, but judgment as to the balancing of many technical, military, and even social considerations,

> including specifically the trade-off between greater safety and greater combat effectiveness.

Id.

The United States Government, Department of Defense, exercised its discretionary function by specifying a locking mechanism which was integrated internally into the carabiner snap links as opposed to specifying a screw down locking mechanism.

The Supreme Court of Alabama by adding this unintended burden on the government contractor has taken the attention away from the original condition which was to decide "who" designed the product. The Supreme Court of Alabama now places the focus on "why" that design was chosen.

OEC has established that all the blueprints, drawings, design criteria and specifications were very precise in nature and that they were all not only approved by the United States, but in fact were provided by the United States as part of its discretionary function. OEC has met their burden of the first condition of the Government Contractors' Defense as outlined in *Boyle* and is entitled to a summary judgment as a matter of law.

IV. WHETHER THE SUPREME COURT OF ALABAMA IS IN DIRECT CONFLICT WITH THIS COURT BY HOLDING THAT THE SECOND CONDITION OF THE GOVERNMENT CONTRACTORS' DEFENSE ALLOWS THE PLAINTIFF TO OVERCOME THE CONTRACTOR'S PROOF THAT THE PRODUCT CONFORMED TO THE GOVERNMENT SPECIFICATIONS BY PRODUCING EVIDENCE WHICH IS TOTALLY IRRELEVANT TO THE ALLEGED DESIGN DEFECT AND WHICH IS BASED ONLY UPON

CONJECTURE AND SPECULATION.

The second condition of the Government Contractors' Defense outlined in *Boyle* requires the government contractor to show that the equipment conformed to the specifications of the United States Government.

The Supreme Court of Alabama has adopted a standard which now allows the injured party to refute the contractor's evidence, and hence defeat the Government Contractors' Defense by mere conjecture and speculation.

There is absolutely no question with respect to the locking mechanism on the gate of the carabiner, but that the carabiner as manufactured met the government specifications. The specification called for an internal locking mechanism and not a screw down lock as the plaintiff claims should have been used.

In the case before this Court, OEC produced three witnesses who testified that the carabiner rings conformed to the specifications of the government as well as producing the certification from the United States official accepting the carabiner as conforming to the specification. Pietz was unable to locate the exact carabiner which was involved in his accident, and hence was unable to produce any direct evidence that showed a nonconformity of the carabiner rings. The only evidence presented by Pietz was in the form of conjecture and speculation. Pietz could only speculate that the carabiner rings failed to conform to the contract because one of OEC's employees testified that he did not personally recall testing each carabiner ring produced. Such conjecture is totally inappropriate in light of the overwhelming evidence that the carabiners did comply with the specification. The carabiners were manufactured with the internal locking mechanism as specified by the government.

OEC produced the testimony of John Wagoner, the individual in charge of quality assurance for OEC, who testified that the U. S. Government provided OEC with two pressure testing machines for the carabiner rings. Mr. Wagoner confirmed that these two machines were used to test each and every carabiner and that each and every carabiner passed the test and conformed to the specifications.

OEC also produced testimony of Inez Feldman, the contract administrator for OEC, who confirmed that all the carabiners were produced in accordance with the plans and specifications provided by the government. OEC also offered into evidence the shipping and material inspection reports which were executed by an official of the U. S. Government upon receipt of each and every carabiner produced by OEC. Upon each shipment of carabiners as they were accepted by the government, the official acknowledged

> Acceptance of listed items has been made by me or under my supervision and they conform to the contract except as noted herein or on supporting documents.

No such exceptions were noted.

The Supreme Court of Alabama ruled that the conjecture produced by the testimony of Lowel Gard, an OEC employee, was enough to overcome the substantial evidence submitted by OEC. The only testimony offered by Mr. Gard that Pietz has tried to use in his support was that Mr. Gard did not personally recall testing each carabiner. Mr. Gard offered no testimony whatsoever to confirm or even imply that any carabiner failed to conform to the contract. His only testimony was that he, personally, did not recall testing every one of them. He also established that all the carabiners he did test, did conform to the government

specifications.

Based only on conjecture from the testimony of Mr. Gard, the Supreme Court of Alabama ruled that OEC failed to prove that the carabiner conformed because, "he (Lowell Gard) did not recall that testing was done on each snap link." *Pietz, supra* [App., infra, B5]

This Court in *Boyle* established the second condition of the Government Contractors' Defense to assure a contractor of the right to rely on the Government Contractors' Defense if he manufactured the equipment according to the specifications. Once the contractor has established evidence to show the equipment was manufactured accordingly, the burden must shift to the plaintiff to produce evidence to the contrary. The plaintiff must produce evidence of a nonconformity.

In *Smith v. Xerox,* 866 F. 2d 135 (5th Cir. 1989) the Fifth Circuit Court of Appeals addressed the ability of the plaintiff to rely purely on conjecture as to whether or not the product conformed with the specifications. In upholding a summary judgment for the contractor, that court stated:

> In the absence of any evidence adduced by Smith tending to show that the VIPER had a manufacturing defect, and in light of the government's acceptance and extended use of the VIPER and Gallagher's testimony that all units were inspected and tested, we find that the district court properly granted summary judgment in favor of Xerox on the second prong of the *Boyle* test.

Id.

The Supreme Court of Alabama has failed to acknowledge the lack of any evidence by Pietz and has wrongfully denied the contractor his rights to a summary judgment

under the Government Contractors' Defense.

The Supreme Court of Alabama, in its opinion, seemed to rely heavily upon the fact that OEC requested and received a charge order from the government early in the manufacturing process with respect to the material to be used in manufacturing the carabiner. There is however, no claim by Pietz that the new alloy used by OEC was improper or in any way contributed to the injury of Pietz. After beginning the manufacturing of the carabiners, OEC learned that a competitor was using a different steel alloy in the metal which made the tooling of the carabiner much easier. OEC sought and obtained a change order to the original contract which allowed OEC to use the different alloy. The testimony of all the OEC employees is that all the carabiners were then produced using the new alloy and that all carabiners conformed in every aspect to the designs of the United States Government.

This discussion of the material change by the Supreme Court of Alabama is irrelevant to whether or not OEC manufactured the carabiner in accordance with the government specifications. The only claim by Pietz is that carabiner was defective because it did not have a screw down locking mechanism.

All the evidence in this case shows that OEC manufactured the carabiner rings in accordance with the very precise specifications approved by the government. OEC is due a judgment, as a matter of law, on the second condition of the Government Contractors' Defense.

V. WHETHER THE SUPREME COURT OF ALABAMA IS IN DIRECT CONFLICT WITH THIS COURT BY HOLDING THAT THE THIRD CONDITION OF THE GOVERNMENT CONTRACTORS' DEFENSE REQUIRES THAT THE

GOVERNMENT CONTRACTOR WARN THE UNITED STATES OF ANY DESIGN DEFECTS WHICH MAY HAVE EXISTED AT THE TIME THAT THE PRODUCT WAS MANUFACTURED, EVEN IF THE GOVERNMENT CONTRACTOR WAS TOTALLY UNAWARE OF ANY SUCH DESIGN DEFECTS.

The Supreme Court of Alabama has interpreted the third condition of the Government Contractors' Defense in such a manner as to *always* create a jury question as to whether the elements of this condition are met. The Supreme Court of Alabama automatically mandates a jury question as to whether the government contractor informed the United States of any alternate designs for the product, whether or not the contractor was ever aware of such alternative designs. This ruling by the Supreme Court of Alabama is in direct conflict with this Court in *Boyle*. The third condition as outlined by this Court is that the contractor warn the government of dangers in the use of the product "which were known to the supplier" and not to the government.

There is no evidence in this case that the government contractor (OEC) knew of any dangers in the use of the carabiner rings. In fact, it has been clearly established that OEC had never manufactured any carabiner rings prior to this particular government contract. OEC was not in the business of producing military equipment and this production was its first order of such military equipment for the United States.

None of the employees of OEC had any specialized knowledge of the products' ultimate use other than a general knowledge that they were to be used in mountain climbing.

The Supreme Court of Alabama's decision takes the emphasis away from the third condition as originally stated which only requires the contractor to warn the government of dangers in the use of the product about which the contractor knows and of which the government was unaware.

The interpretation of the this third condition by the Supreme Court of Alabama places an expanded burden upon the government contractor not contemplated by this Court in *Boyle*. The Supreme Court of Alabama foreclosed the possibility of a summary judgment for the contractors by requiring a review of whether or not a "design defect" existed at the time of manufacture. If there existed a "design defect", the Supreme Court of Alabama would automatically impute liability to the contractor whether or not the contractor was aware of such "defect." The court stated:

> However, if there existed any design defects related to safety or performance, there is a genuine question whether the contractor informed the government about them.

Pietz, supra [App., infra. B5].

Such an interpretation by the Supreme Court of Alabama states that the government contractor is under a duty to advise the United States of any design defects, known *or unknown* to the contractor. This is in essence a strict liability standard for the government contractor. The Supreme Court of Alabama fails to take into account this Court's ruling in *Boyle* that the critical factor is "danger in the use of the equipment *known* to the supplier."

In this case OEC was not aware of any dangers in the use of the product that the government was not aware. All the witnesses testified they had no knowledge of the use of car-

abiners at the time of manufacture and all of them testified that they were not aware of any danger in its use of which the government was not aware. The Supreme Court of Alabama found the awareness or knowledge of any danger by the contractor immaterial by stating that *if* there existed any "design defect", known or unknown to the contractor, then the contractor is liable if the government was not warned of it.

OEC has already established the evidence necessary to comply with the third condition of the Government Contractors' Defense and is due a summary judgment as a matter of law.

CONCLUSION

The Government Contractors' Defense as now applied by the Supreme Court of Alabama is in direct conflict with the letter and spirit of the Government Contractors' Defense as outlined by this Court in *Boyle*. The Supreme Court of Alabama has established unfair and unduly burdensome requirements upon the government contractor, none of which were contemplated, and some of which were specifically rejected, by this Court.

To allow the decision of the Supreme Court of Alabama to go unreviewed by this Court will in effect deny all government contractors their right to rely on this federal policy in all cases which are brought under Alabama law. Any contractor who introduces military equipment into the stream of commerce which would subject him to the application of Alabama law whether in state or federal court, will have to comply with the interpretation of the Supreme Court of Alabama as it relates to this defense and know that under no circumstance may a summary judgment be granted on its behalf.

OEC, as a manufacturer of military equipment, has been sued under Alabama design defect law which is in direct conflict with the federal Government Contractors' Defense. OEC has established, and Pietz has been unable to refute that (1) the United States supplied very precise specifications for the carabiner; (2) the carabiners conformed to the specifications; and (3) OEC was not aware of any danger in the use of the product that were not known to the United States. Under the provisions of *Boyle,* OEC is due to have a summary judgment granted in its favor.

The decision as it stands is of grave concern to all government contractors and requires remedy by this Court. If this Court fails to render an opinion in this matter, it is very possible OEC could win this case at the trial court level on its merits and leave unaddressed the Supreme Court of Alabama's erroneous interpretation of this most critical federal policy.

WHEREFORE, OEC requests this Court to grant this petition so that the ruling of the Supreme Court of Alabama can be addressed and remedied as soon as possible and so that OEC can have entered in its favor the summary judgment due under *Boyle.* Respectfully submitted on this the 21st day of June, 1990.

H. C. Ireland, III
Counsel of Record
PORTERFIELD, HARPER & MILLS, P.A.
#2 Office Park Circle, Suite 1
P.O. Box 530790
Birmingham, AL 35253-0790
(205) 879-5000

APPENDIX A

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

HAROLD WALTER PIETZ
Plaintiff
vs.
ORTHOPEDIC EQUIPMENT COMPANY INC., et al
Defendants

CV-87-7231

ORDER

The Court having considered the Defendant's, Orthopedic Equipment Company, Motion for Summary Judgment finds there is no genuine issue as to any material fact and that the Defendant is entitled to a summary judgment as a matter of law. The Court enters a judgment for the Defendant, Orthopedic Equipment Company, and against the Plaintiff and taxes any costs in connection with said action to the Plaintiff.

The Court further finds pursuant to Rule 54(b) of the Alabama Rules of Civil Procedure there is no just cause for delay and enters a final summary judgment for said Defendant and against the Plaintiff.

3-30-89
DATE

/s/ Wayne Thorn
Wayne Thorn, Circuit Judge

(cc: Attys. Trey Ireland and Bob Kirby)

APPENDIX B

RELEASED DEC 22, 1989
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1989-90

88-908

Harold Walter Pietz
v.
Orthopedic Equipment Company, Inc.
and Biomet Inc.

Appeal from Jefferson Circuit Court
(CV-87-7231)

SHORES, JUSTICE.

Harold Walter Pietz, a student at Jacksonville State University, was injured when he fell during an ROTC field exercise on November 16, 1985. The Jacksonville State ROTC unit was required to rappel down a cliff, using equipment issued by the ROTC unit. Part of this equipment was the snap link mountain piton (a/k/a a carabiner) manufactured by Orthopedic Equipment Company, Inc. ("OEC"), a wholly-owned subsidiary of Biomet, Inc. As Pietz descended a steep cliff, the non-locking gatekeeper portion of the snap link opened, causing the rope to slacken and Pietz to free fall approximately 80 feet along the rock ledge. Pietz was severely injured in this fall.

Pietz filed suit against OEC under the Alabama Extended Manufacturer's Liability Doctrine, alleging defects in the design of the snap link. The complaint was amended to add F. I. Saemann Enterprises, Inc., and Biomet, Inc., as defendants. All three defendants filed motions for summary judgment, contending that the snap link was designed by the Federal Government and claiming

immunity from liability for any design defects, under the government contractor defense doctrine. The motions were originally heard by the trial judge on October 6, 1988. Summary judgment was entered in favor of F. I. Saeman Enterprises, Inc., at that time. The trial judge suggested that he certify the government contractor defense issue for A. R. App. P. Rule 5 review. However, after an attempt by the defendants to move the cases to the United States District Court and a remand of the case to state court, the trial judge heard the motions and entered summary judgment on behalf of OEC and Biomet on March 30, 1989. Pietz appeals from this judgment.

The issues before us are: (1) whether the trial judge erred in entering summary judgment based on the government contractor defense as set forth in *Boyle v. United Technologies Corp.*, __ U.S. __, 108 S. Ct. 2510 (1988), and (2) whether Biomet is a "successor in interest" to OEC.

The government contractor defense originated in the case of *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). The *Yearsley* case involved a government contractor who built some river dikes for the government; the work caused erosion on land adjacent to the dikes. The United States Supreme Court stated, "[I]f [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. Two later cases created the Feres-Stencel doctrine, which were followed until *Boyle*. See, *Feres v. United States*, 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

In *Boyle*, the United States Supreme Court reviewed the various government contractor defenses utilized by the circuit courts of appeals. The issue before the *Boyle* Court was whether a contractor providing military equipment to the Federal Government could be held liable under state tort

law for injury resulting from a design defect. *Boyle* created a new government contractor defense and enunciated a three-part test:

> "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."

__ U.S. at __, 108 S. Ct. 2510 at 2518.

The Supreme Court makes it clear in *Boyle* that whether the facts of the case establish the condition for the defense is a question for the jury. The Court, in remanding the case, wrote:

> "It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what the petitioner asserts occurred, would be error *since whether the facts establish the conditions for the defense is a question for the jury.*"

__ U.S. at __, 108 S. Ct. 2510 at 2519 (emphasis added).

Further, the Supreme Court in *Boyle* cautioned that it was not suggesting that state law would generally be preempted by the government contractor defense. To illustrate, the Court used two examples:

> "If, for example, the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law

> imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the government but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. *No one suggests that state law would generally be pre-empted in this context.*"

Id., __ U.S. at __, 108 S. Ct. at 2516 (emphasis added). The second example given by the Supreme Court was as follows:

> "If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered."

Id., __ U.S. at __, 108 S. Ct. at 2516.

Thus, it is clear that the question of whether a government contractor is to be shielded from liability becomes a question for the jury to weigh. It is also clear that the threshold question is whether the equipment is indeed "military equipment."

In the present case, the trial judge entered summary judgment for OEC and Biomet. Summary judgment is proper if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), A. R. Civ. p. Besides the question of whether the snap links are "military equipment," the facts of the case must be considered against the other tests enunciated by *Boyle*.

The first numbered test in *Boyle* requires that the court

examine whether the United States approved reasonably precise specifications. The record is devoid of any evidence that the Government at any time considered and rejected the idea of a locking device on the gatekeeper feature of the snap link. In fact, it was the deposition testimony of Lowell Gard, a supervisor at OEC, who had general responsibility for in-plant operations during the manufacture of the snap links, that the workers at OEC did not have any discussion with the Government people about a safety locking nut or the lack of a locking nut on the snap link.

The second numbered test in *Boyle* is whether the equipment conformed to those specifications. The deposition testimony of John Wagoner, a quality control technician at OEC; Inez Feldman, a contract administrator; and Lowell Gard, was that OEC was aware of a problem in the specifications and had detected it soon after receiving the specifications. OEC applied for and obtained a deviation from the specifications provided by the Government after examining similar snap links manufactured by competitors. John Wagoner testified in his deposition as follows:

> "Q: The Government agreed to pay Orthopedic Equipment four hundred thousand dollars as a result of some defects in the original specifications, material specification?
>
> "A. I wouldn't like to call them defects in the material specifications, but there was something dramatically wrong."

The deposition testimony of Lowell Gard was that the material change involved a substance called 4041 steel, which was used by a competing company that added lead to the alloy to prevent the material from warping during the heat treatment. There was also conflict in the deposition testimony as to whether the specifications were complied with and what testing of the snap links was done. Lowell Gard testified that the snap links were tested on a "feel deal" that

entailed manually snapping the link. However, he did not recall that testing was done on each snap link.

The final numbered test is whether the supplier warned the United States Government about the dangers in the use of the equipment that were known to the supplier but not to the Government. The Court of Appeals for the Fifth Circuit has paraphrased the third test by stating that it requires that the "government contractor warn the government when the contractor has information which the government lacks." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 at 1481 (5th Cir., *cert. denied*, __ U.S. __, 110 S. Ct. 327 (1989). The deposition testimony of Gard, Wagoner, and Feldman indicates that OEC knew that these snap links were to be used for mountain climbing. OEC sought a design deviation that would help OEC more easily manufacture the snap link. However, if there existed any design defects related to safety or performance, there is a genuine question whether the contractor informed the Government about them. The deposition testimony clearly presents a jury question as to whether the facts establish the condition for the utilization of the defense. *Boyle*, __ U.S. at __, 108 S.Ct. at 2519.

Furthermore, this case was brought under the Alabama Extended Manufacturer's Liability Doctrine statutes. There has been no opportunity for a jury to test the facts of the case against state law. The United States Supreme Court in *Boyle* says that it does not suggest that state law would generally be pre-empted by the government contractor defense. There is no federal statute authorizing pre-emption of state law in cases of this kind. In fact, the Congress of the United States has for 50 years resisted the lobbying efforts by defense contractors to pass such statutes.

Having determined that the government contractor defense is a question for the jury, we must determine

whether defendant Biomet is a successor in interest to the manufacturer, Orthopedic Equipment Company, Inc. To determine successor liability, this Court has adopted the "basic continuity of the enterprise" test. See *Andrews v. John E. Smith's Sons Co.*, 369 So.2d 781 (Ala. 1979), *Rivers v. Stihl, Inc.*, 434 So.2d 766 (Ala. 1983), *Turner v. Wean United, Inc.*, 531 So.2d 827 (Ala. 1988). We wrote the following in *Andrews*:

> "As a general rule, where one company sells or otherwise transfers all its assets to another company, the transferee is not liable for the debts and liabilities of the transferor unless (1) there is an express agreement to assume the obligations of the transferor, (2) the transaction amounts to a de facto merger or consolidation of the two companies, (3) the transaction is a fraudulent attempt to escape liability, or (4) the transferee corporation is a mere continuation of the transferor."

369 So.2d at 785 (citations omitted). We set out the factors of the "continuity of the enterprises" test in *Turner v. Wean United, Inc.*, which adopts factors enunciated by the Michigan Supreme Court in *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976):

> "The first factor of the continuity of the enterprise test, and arguably the most important, is whether there is a basic continuity of the seller corporation, a retention of key personnel, assets and operation. ...
>
> "The second factor of the continuity of enterprise test is whether the selling corporation dissolves shortly after the transfer of assets. ...
>
> "The third factor to be considered is whether [the purchasing corporation] expressly assumed the liability of the [seller corporation]. ...
>
> "The final factor of the continuity of enterprise

> test, as explained in *Turner*, is whether the purchasing corporation held itself out to the world as the effective continuation of the seller corporation."

531 So.2d 827, 830-31. This also presents a question for the jury.

For the reason stated above, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Hornsby, C. J., and Jones, Adams, Houston, and Kennedy, JJ., concur.

Maddox and Steagall, JJ., dissent.

Harold Pietz v. Orthopedic Equipment Co.
MADDOX, JUSTICE (dissenting).

Harold Walter Pietz was injured when he fell during a rappelling exercise in ROTC.[1] The carabiner used to secure the rope to Pietz and to slow his descent opened and caused him to fall rather than descend down the rope in a controlled manner. The carabiner was manufactured by Orthopedic Equipment Company (hereinafter "OEC"), a wholly-owned subsidiary of Biomet, Inc. Pietz sued OEC and Biomet under the Alabama Extended Manufacturer's Liability Doctrine ("A.E.M.L.D."); the trial court entered summary judgments for both defendants.

I believe the majority has incorrectly decided the issue of whether OEC and Biomet are shielded from liability by the government contractor defense set forth in *Boyle v. United Technologies Corp.*, __ U.S. __, 108 S. Ct. 2510 (1988).

The rationale behind the government contractor defense was set forth in *Boyle* as follows:

> "We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision [28 U.S.C. § 2680(a), part of the Federal Tort Claims Act]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effec-

---

[1]To rappel, Pietz assembled a web seat and hooked the seat together with a carabiner; he looped an anchored rope through another carabiner and attached that carabiner to the one hooked to his web seat. The friction of the rope through the second carabiner slows the descent of the person rappelling; there are other devices that serve the function of slowing the movement of the rope. These include locking carabiners and "figure eight" rings.

> tiveness. And we are further of the the view that permitting 'second-guessing' of these judgments [citation omitted] through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."

__ U.S. at __, 108 S. Ct. at 2517-18.

In order for a government contractor to be shielded by this defense, the following test must be met:

> "Liability for design defects in military equipment cannot be imposed pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."

__ U.S. at __, 108 S. Ct. at 2518.

The majority states that carabiners do not appear to be

"military equipment." This statement results from what I believe is a misrepresentation of the evidence. The carabiners were designed by and ordered by the Army for use in military maneuvers and exercises by military personnel. Rappelling is an essential element of the deployment of troops from helicopters and over cliffs, rough terrain, and the sides of buildings. Certainly the carabiners were not being used by the military for recreational or industrial purposes; therefore, I believe the majority errs in suggesting that the carabiner was not "military equipment." To say that "military equipment" included only such equipment as was actually used to fire some sort or ordnance fails to follow the test set out in *Boyle*.

In fact, it is clear from the record that OEC met all three parts of the test in *Boyle*. As to part (1), the specifications for the carabiners *came from* the Government; OEC had never manufactured carabiners before, and all the specifications were supplied to it by the Government. The only design change made by OEC was a change it requested in the specifications to allow it to use a superior metal alloy in the manufacture of the carabiners; the Government approved this change, a change that had nothing to do with Pietz's injury.

This is not a case where the contractor provided all the specifications to the Government and the Government then merely "rubber stamped" the specifications, as was the situation in *Trevino v. General Dynamics Corp.*, 865 F. 2d 1474 (5th Cir.), cert. denied, __ U.S. __, 110 S. Ct. 327 (1989). Here, the Government did more than *approve* "reasonably precise specifications"—it *provided* them.

The majority unfortunately justifies its holding by saying that there was no evidence that the Government considered a locking device for the carabiner. That has nothing to do with anything in this case. *The Government is not the defendant here*, and the issue, according to *Boyle*, is

whether the Government *approved* reasonably precise specifications, which the Government obviously did in this case. The question of whether *the Government* should have, or could have, considered other designs is totally immaterial; it is not an issue.

Concerning the second element of the test, there is no evidence that the carabiner in question or any of the other carabiners were manufactured other than pursuant to the specifications provided by the Government. All the evidence indicates that OEC manufactured the carabiners to specification and that the Government accepted them and acknowledged that they met specifications.

As to the third part of the test, all the evidence indicated that OEC had no knowledge of any danger in the use of the carabiners that the Government itself did not have. The majority says that there is a genuine question of whether OEC informed the Government about design defects related to safety. Again, the majority misinterprets the record, for it shows that there was *no evidence that OEC knew of any design defects related to safety*, and there was no evidence that OEC had knowledge about carabiners, their use, and their safety that the Government did not already have. As mentioned above, OEC had never made carabiners before, and its employees had only a general knowledge of what they were to be used for—mountain climbing. Yet it is clear that the military had extensive knowledge of the use of carabiners. Indeed, because the military supplied the specifications for the carabiners, it is clear that the Government had knowledge about their uses and their dangers. Pietz contends that the carabiners would have been safer with a screw-down locking device on the gate part; the evidence showed that the military used carabiners both with and without the locking device. Clearly, the decision to use nonlocking carabiners is the type of discretionary function protected by 28 U.S.C. § 2680(a) and the

government contractor defense.

I am absolutely convinced that the defendants in this case met the test in *Boyle* and are protected from liability under the A.E.M.L.D., and that the learned trial judge was eminently correct.

The rationale for the government contractor defense is to prevent what is, in effect, indirect lawsuits such as this against the Federal Government based upon its discretionary function of selecting military equipment; the costs of suits against contractors will only be passed on to the Government. The majority's opinion has the effect of allowing plaintiffs to sue the Federal Government in a state court.

Even if the *Boyle* defense was not controlling, the majority's opinion is incorrect, because Pietz was contributorily negligent, as a matter of law. The record shows that there were locking carabiners available at the ROTC exercise site. There were also "figure eight" rings at the site; these are solid devices shaped like the number "8" and are used in rappelling to hold the rope, and, being solid, they cannot open. Despite his knowledge that the locking carabiners and the "figure eight" rings were there, *Pietz intentionally decided to use the nonlocking variety of carabiner when attaching himself to the rope.* Pietz stated that he "didn't see any need for" the locking carabiner, even though other students had used one. Pietz's deposition shows that he was knowledgeable in rappelling because he had rappelled many times; he had started rappelling when he was in the eighth grade, and he had been trained in rappelling by the Civil Air Patrol and by the ROTC.

I would affirm the judgment of the trial court. Therefore, I dissent.

Steagall, J., concurs.

APPENDIX C

MAILING ADDRESS:
P.O. BOX 157
MONTGOMERY, ALABAMA 36101
TELEPHONE: 261-4609

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 88-908

Harold Walter Pietz
Appellant
vs.
Orthopedic Equipment Company, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell ___ granted 7 additional days to file briefs to and including
_____ Appellant(s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed

_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No opinion.
XXXX Application for rehearing overruled. No opinion written on rehearing.
Shores, J.—Hornsby, CJ., Jones, Adams, Houston and Kennedy, JJ., concur; Maddox and Steagall, JJ., dissent.

3/23/90
bsa

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

HAROLD WALTER PIETZ
Plaintiff
vs.
ORTHOPEDIC EQUIPMENT COMPANY INC., et al
Defendants

CV-87-7231

ORDER

UPON consideration of the motion for stay as filed by the defendant's in this matter, and upon findings by this court that the Government Contractor's Defense as interpreted by the Alabama Supreme Court is a decision which deserves review by the Supreme Court of the United States and upon finding that the disposition of this matter by the Supreme Court of the United States prior to trial would be in the interest of judicial economy it is

ORDERED, ADJUDGED AND DECREED that this matter is hereby stayed pending a review by the Supreme Court of the United States of the decision entered in this matter by the Supreme Court of Alabama.

Done this 18 day of June, 1990.

/s/ Wayne Thorn
Circuit Judge Wayne Thorn